

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**January 31, 2017**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2015AP2661**

**Cir. Ct. No. 2014CV1104**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**NIKOLE HAVENS,**

**PETITIONER-APPELLANT,**

**V.**

**WISCONSIN DEPARTMENT OF HEALTH SERVICES,**

**RESPONDENT-RESPONDENT.**

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APPEAL from an order of the circuit court for Rock County:  
MICHAEL R. FITZPATRICK, Judge. *Affirmed.*

Before Brennan, P.J., Kessler, and Brash, JJ.

¶1 PER CURIAM. Nikole Havens appeals from an order denying her request for attorney's fees and costs associated with her petition for judicial review

of an administrative decision. Because Havens was not a “prevailing party” within the meaning of WIS. STAT. § 814.245(3) (2015-16), we affirm.<sup>1</sup>

## **I. BACKGROUND**

¶2 The underlying facts are undisputed. Havens was diagnosed with a serious congenital medical condition as a child. In March 2013, she was certified as “presumptively disabled” and applied for Medicaid benefits as a person eligible for the Medicaid Purchase Program (MAPP).

¶3 On August 1, 2013, the Wisconsin Disability Determination Bureau (DDB) concluded that Havens did not meet the Social Security disability criteria necessary to qualify for MAPP. Four days later, the Wisconsin Department of Health Services (DHS) issued a written notice to Havens informing her that her Medicaid benefits would be terminated effective September 1, 2013.

¶4 After receiving the termination notice, Havens requested a fair hearing and asked that her Medicaid benefits continue pending the issuance of a fair hearing decision. Her request was made pursuant to WIS. STAT. § 49.45(5)(b)2., which provides:

If a recipient requests a [fair] hearing..., medical assistance coverage shall not be suspended, reduced, or discontinued until a decision is rendered after the hearing but medical assistance payments made pending the hearing decision may be recovered by the department if the contested decision or failure to act is upheld.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

Consequently, while the proceedings were pending, Havens continued to receive Medicaid benefits in September and October 2013.

¶5 On October 10, 2013, the Administrative Law Judge remanded the matter to the DDB for reconsideration. A final determination later upheld the finding that Havens was ineligible for Medicaid benefits.<sup>2</sup> In the circuit court, the parties agreed that the October 10, 2013 decision was the decision “rendered after the hearing” for purposes of WIS. STAT. § 49.45(5)(b)2.

¶6 On April 22, 2014, Rock County Human Services issued a “Wisconsin Medicaid and BadgerCare Plus Overpayment Notice” to Havens. The notice explained that Havens received a Medicaid overpayment of \$4575.43 during the time period of September 1, 2013, to October 31, 2013. The notice additionally referenced the fair hearing decision dated October 10, 2013, which held that the county had correctly closed benefits upon receipt of the DDB’s finding that Havens did not meet the Social Security disability criteria.

¶7 Havens subsequently requested an appeal and a fair hearing on the overpayment notice. In its decision, the Division of Hearings and Appeals (DHA) concluded that DHS “correctly seeks recovery of benefits overpaid to [Havens] as aid continuation during the pendency of her MAPP disability appeal, where she was not the prevailing party.” DHA denied Havens’ request for a rehearing.

¶8 Havens then filed a petition for judicial review seeking reversal of the DHA decision on DHS’s right to recover overpayments from her. As grounds for review, she argued: (1) DHS lacks the statutory authority to recover Medicaid

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<sup>2</sup> Havens does not challenge the Medicaid eligibility decision in the present appeal.

benefits paid during the pendency of a fair hearing proceeding, and (2) DHS lacks the legal authority to recover “benefits paid after the date of an adverse fair hearing decision.”

¶9 The circuit court affirmed DHA and held that DHS had the legal authority to recover overpayments made to Havens between September 1, 2013, and October 10, 2013, thereby rejecting Havens’ first argument for review. The court further held that DHS lacked the legal authority to recover benefits paid to Havens between October 11, 2013, and October 31, 2013. It found, however, that there was no evidence in the record indicating that any benefits were paid to Havens in this latter period.

¶10 Havens then moved for fees and costs “on grounds that [she] was the prevailing party as to one or more issues presented for judicial review” and that “[DHS]’s position with respect to each such issue was not substantially justified.” Havens sought \$17,854.18 in total fees and costs for all of the legal work conducted between June 16, 2014, and September 10, 2015, on her behalf.

¶11 The circuit court denied Havens’ motion. The court concluded that Havens was not a prevailing party for purposes of recovery under WIS. STAT. § 814.245(3); that DHS’s position was “substantially justified”; and that Havens had not clearly calculated the fees to which she claimed to be entitled.

## II. DISCUSSION

¶12 At issue is whether Havens—because the circuit court concluded DHS lacked the legal authority to recover benefits paid to her between October 11, 2013, and October 31, 2013—is a prevailing party within the meaning of WIS.

STAT. § 814.245(3) and is therefore entitled to attorney’s fees and costs incurred in the judicial review.

¶13 The interpretation of a statute is a question of law subject to our independent review. *See Kitsemble v. DHSS*, 143 Wis. 2d 863, 866, 422 N.W.2d 896 (Ct. App. 1988). WISCONSIN STAT. § 814.245(3), provides:

[I]f an individual ... is the prevailing party in any action by a state agency ... and submits a motion for costs under this section, the court shall award costs to the prevailing party, unless the court finds that the state agency was substantially justified in taking its position or that special circumstances exist that would make the award unjust.

The introduction to § 814.245 provides: “The legislature intends that courts in this state, when interpreting this section, be guided by federal case law ... interpreting substantially similar provisions under the [F]ederal [E]qual [A]ccess to [J]ustice [A]ct, 5 U[.]S[.]C 504.” *See* § 814.245(1). Consequently, we will look to both state and federal cases for guidance.

¶14 As relevant here, an individual prevails within the meaning of WIS. STAT. § 814.245(3) if “he or she succeeds on any significant issue in litigation which achieves some of the benefit sought in bringing suit.” *See Kitsemble*, 143 Wis. 2d at 867. That is, a “prevailing party” must “receive at least some of the relief he or she requests.” *Id.* In determining whether a party prevails in actions involving more than one contested issue, the court must take into account “the relative importance of each issue.” Sec. 814.245(4). The court may award partial costs based on such determinations. *Id.*

¶15 Although the circuit court held that DHS could not legally recover overpayments made on behalf of Havens after October 10, 2013, it also found there was no evidence that DHS actually paid any benefits on behalf of Havens

after that date.<sup>3</sup> DHS sought to recover \$4575.43 from Havens. Of this amount, DHS attributed \$2165.61 to Havens' October 2013 benefit.<sup>4</sup> However, as the circuit court concluded, there was no evidence in the record that this benefit was paid to Havens after the October 10, 2013 cut off.

¶16 We agree with DHS that under the circuit court's ruling, Havens could prevail only if she showed that she received benefits after October 10, 2013. Because the question of whether benefits were actually paid to Havens during that period was unresolved, Havens did not demonstrate an entitlement to any relief.

¶17 For purposes of Havens' motion for fees and costs, this lack of resolution is determinative. The burden was on Havens to prove that she was the "prevailing party." *See, e.g., Owner-Operator Indep. Drivers Ass'n, Inc. v. Federal Motor Carrier Safety Admin.*, 675 F.3d 1036, 1038 (7th Cir. 2012) (noting the petitioners' acknowledgement that they bore the burden of proving eligibility for fees as the prevailing parties).<sup>5</sup> She failed to do so.

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<sup>3</sup> In its opinion and order denying Havens' motion for fees and costs, the circuit court reiterated:

There is no question as to the total amount that was paid by [DHS], and that over \$2[]400.00 of that amount was paid in September 2013, but there is no evidence one way or another to show that any bills were paid after October 10, 2013 on behalf of Ms. Havens.

<sup>4</sup> As to the amount of the overpayment, the notice provided:

09/2013—Net Paid Medicaid \$2406.48 + Net Capitation \$ 3.34 = \$2409.82  
10/2013—Net Paid Medicaid \$2148.75 + Net Capitation \$16.86 = \$2165.61

Total = \$4575.43

<sup>5</sup> DHS submits, and Havens does not refute, that she had the burden in this regard. *See Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded).

¶18 Havens contends that the circuit court’s conclusions about the lack of evidence in the record as to when payments were made in October 2013 have no bearing on whether she qualifies as a prevailing party. Rather, she asserts, the inquiry is whether the prevailing party received relief from the court. According to Havens, the relief she received was the material alteration of her legal relationship with DHS. *See Carvajal v. United States*, 521 F.3d 1242, 1249 (9th Cir. 2008) (“Relief” for purposes of the prevailing party requirement “must be in the form of a judicially sanctioned material alteration of the legal relationship of the parties.”) (four sets of internal quotation marks and citations omitted).

¶19 Havens submits that the circuit court’s decision materially altered the legal relationship of the parties to her benefit “because it limited the scope of [DHS]’s recovery authority by more than one-third *of the time* given in the overpayment notice.” (Emphasis added.) She continues: “Because the circuit court limited the government’s discretion by prohibiting [DHS] from recovering benefits paid after the issuance of the fair hearing decision, Ms. Havens is a prevailing party.” We are not convinced that a reduction *of the time* stated in the overpayment notice—with no correlating reduction in the actual amount of the overpayment—qualifies as relief under the circumstances presented.

¶20 Because Havens was not a prevailing party, her claim for attorney’s fees and costs fails. Given our determination of this issue, we need not reach the questions of whether DHS’s position was substantially justified or whether Havens submitted appropriate documentation to establish entitlement to a fee award. *See Sweet v. Berge*, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (if we dispose of a case on one issue, we need not reach other issues).

*By the Court.*—Order affirmed.

This opinion will not be published. See WIS. STAT.  
RULE 809.23(1)(b)5.



